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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

Lily, *et al*,

Plaintiffs,

v.

Jan Rouven Fuechtener,

Defendant.

Case No. 2:19-cv-00352-RFB-EJY

**RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PREJUDGMENT WRIT OF  
ATTACHMENT**

[ECF No. 5]

Plaintiffs' Motion for Prejudgment Writ of Attachment (ECF No. 5) is fatally deficient for procedural and substantive reasons. Plaintiffs have not complied with the notice requirements or sufficiently alleged a valid request to issue a writ of attachment. More fundamentally, Nevada treats Fuechtener's right to the funds Plaintiffs are seeking as exempt property since the funds qualify as an undistributed interest in a trust. The Court should deny Plaintiffs' motion.

**MEMORANDUM OF POINTS & AUTHORITIES**

Plaintiffs motion for pre-judgment writ of attachment asks the Court to issue a writ attaching to “property owned by...Jan Rouven Fuechtener.” (ECF No. 5 at 1-2). The Plaintiffs’ are seeking a writ of attachment to funds being held in the court registry in the U.S. District Court for the District of Nevada. (ECF No. 5 at 3, 7). Although the Plaintiffs do not bother to provide any further description, Fuechtener believes that the relevant funds Plaintiffs referenced are those being held by court order in connection with the criminal prosecution in *United States v. Fuechtener*, No. 2:16-cr-100-GMN-CWH (Dist. N.V.)<sup>1</sup>. The origin of these funds bears repeating here in brief.

Fuechtener is currently married to Frank Alfter and they both previously resided in a home located at 7080 Donald Nelson Avenue in Las Vegas. (Crim. ECF No. 207 at 2). Several years before Fuechtener was married the residence was purchased and titled in the name of the F.A.J.R. Magic Trust (“Magic Trust”). (Crim. ECF No. 214 at 2). There has never been any dispute that the home on Don Nelson Avenue was owned by the Magic Trust. (Crim. ECF No. 207 at 2) (“parties do not dispute,” Magic Trust ownership). Fuechtener and his spouse are the grantors, co-trustees, and primary beneficiaries of the trust. (Crim. ECF No. 207 at 2). After the Donald Nelson property was sold in May 2017, the proceeds of the sale owed to the Magic Trust was more than \$1.3 million dollars.

The United States filed an emergency motion to restrain the distribution of

<sup>1</sup> Citations to documents filed in the related criminal case are notated as “Crim. ECF No. X”.

1 the proceeds from the sale of the Donald Nelson property. The proceeds were  
2 ordered to be held by the Clerk of Court pending Fuechtener's sentencing to satisfy  
3 criminal monetary penalties after protracted briefing from multiple parties and an  
4 evidentiary hearing. (Crim. ECF No. 295). Importantly, the legal authority to retain  
5 the funds was based on the Federal Debt Collection Procedures Act ("FDCPA"), 28  
6 U.S.C. § 3001 *et seq.*, which applied to criminal penalties. The FDCPA remedies do  
7 not apply to this case.

8 Fuechtener was later sentenced to prison and the presiding judge ordered the  
9 \$585,300.00 in criminal monetary penalties paid directly from the Donald Nelson  
10 property proceeds being held in the registry of the Court. (Crim. ECF No. 341, 345).  
11 The remaining funds held in the Court's registry from the sale of the Donald Nelson  
12 property, which was entirely owned by the Magic Trust, are the property which  
13 Plaintiffs now want to seize via pre-judgment writ of attachment. (ECF No. 5 at 7).

#### 14 **SUMMARY OF ARGUMENT**

15 Nevada law applies to Plaintiffs' request for pre-judgment writ of  
16 attachment. Fed. R. Civ. P. 64(a). The extraordinary remedy of attachment is  
17 governed by Chapter 31 of the Nevada Revised Statutes. Plaintiffs specifically  
18 brought their motion under N.R.S. § 31.013. (ECF No. 5 at 6) (quoting same in full).  
19 Plaintiffs have woefully failed to comply with mandatory affidavit requirements of  
20 N.R.S. § 31.020. The affidavits Plaintiffs do provide rely entirely on inadmissible  
21 hearsay and do not constitute competent evidence. Plaintiffs have similarly  
22 disregarded the prerequisite statutory notice requirements for writs of attachment.

1 See Nev. Rev. Stat. Ann. § 31.045. Granting a prejudgment writ of attachment when  
 2 Plaintiffs have not complied with Nevada state law would violate Fuechtener's  
 3 constitutional right to due process of law. See *Connecticut v. Doeher*, 501 U.S. 1,  
 4 (1991) (state prejudgment attachment statute violated Constitution where it failed  
 5 to protect Doeher's due process rights).

6 Plaintiffs' motion should also be denied because they are seeking attachment  
 7 to funds which are exempt from execution under Nevada law. The funds being held  
 8 by the Clerk of Court in the related criminal case are proceeds from the sale of real  
 9 estate which was wholly owned by the Magic Trust. (Crim. ECF No. 207 at 2).  
 10 Plaintiffs ability to recover property after obtaining a judgment in their favor in this  
 11 proceeding under 18 U.S.C. § 2255(a) is controlled by Nevada state law. Nevada  
 12 makes a person's property which constitutes an undistributed interest in trust  
 13 property as exempt from execution. See Nev. Rev. Stat. Ann. § 21.090(cc) & (dd).  
 14 The funds held in the registry of the court belong to the Magic Trust and Plaintiffs  
 15 cannot attach to any interest or right Fuechtener might possess in this exempt  
 16 property. Plaintiffs' motion should be denied.

## 17 **ARGUMENT**

18 **I. Plaintiffs' motion for writ of attachment is procedurally deficient**  
 19 **and should be denied on these grounds alone.**

20 **A. Plaintiffs have not provided specific notice to Fuechtener as**  
 21 **required by Nevada statute.**

22 A prejudgment writ of attachment is an extraordinary remedy and the  
 23 Nevada statutory requirements must be strictly complied with for such a writ to  
 issue. *Paramount Ins., Inc. v. Rayson & Smitley*, 472 P.2d 530 (1970) (attachment

1 based on conclusory affidavit was improper). Plaintiffs are seeking a pre-judgment  
2 writ of attachment expressly relying upon the authority of N.R.S. § 31.013. That  
3 provision of law enumerates three types of cases in which the court is authorized  
4 “after notice and hearing,” to direct the clerk of court to issue a writ of attachment.  
5 Nev. Rev. Stat. Ann. §31.013.

6 But the “notice” referenced in § 31.013 calls for more than mere personal  
7 service of the motion or writ. *See* Nev. Rev. Stat. Ann. § 31.045. The specific  
8 statutory notice provision found in Chapter 31 states that “Execution on the writ of  
9 attachment by attaching property of the defendant may occur only if,” the notice  
10 requirements are met. Nev. Rev. Stat. Ann. § 31.045 (emphasis added). One key  
11 part of the required notice is the command to serve “the defendant with notice,”  
12 which “must be substantially,” in the form provided in § 31.045. A complete copy of  
13 N.R.S. § 31.045 is attached to this response as **Exhibit A** and incorporated by  
14 reference. The required notice found in § 31.045 is detailed and highly specific about  
15 property exemptions and the rights of the person who are served.

16 At this juncture the question is simple: did Plaintiffs comply with the  
17 mandatory language of § 31.045 and give Fuechtener proper notice? Of course not.  
18 The Court can look to the declaration and exhibit filed by Plaintiffs’ counsel on  
19 September 30, 2019 to see what notice was given. (ECF No. 26 & 26-1). Plaintiffs  
20 did not even attempt to meet the specific notice requirements to allow attachment  
21 under § 31.045 and § 31.013. The remedy of a writ of attachment is purely statutory  
22 and proceedings to obtain attachment must conform strictly to the statutory  
23

requirements. *Green v. Hooper*, 167 P.2d (1917); *see, e.g., Application of Loer*, 226 P.2d 272, 274 (1951) (reaffirming *Hooper* in passing). The Court should deny Plaintiffs' motion for writ of attachment as a result.

**B. Affidavits provided in support of motion are conclusory and deficient**

The Court should also deny the Plaintiffs' motion because the affidavits provided in support of attachment are insufficient. *See Paramount Ins., Inc. v. Rayson & Smitley*, 472 P.2d 530 (1970) (conclusory affidavit from counsel could not support attachment). Applications for writ of attachment must be supported by affidavits that strictly comply the detailed requirements specified by the Nevada Legislature. Nev. Rev. Stat. Ann. § 31.020. The affidavit must be made by someone with "personal knowledge" of the facts asserted and describe in "reasonable and clear detail" the facts which show the grounds for attachment. *Id.* The affiant must also:

State whether, to the best information and belief of the affiant, the money or property sought to be attached is exempt from execution.

Nev. Rev. Stat. Ann. § 31.020(h). The affidavits given by Plaintiffs fall short.

First, the two affidavits provided by Carol Hepburn and Deborah Bianco do not state whether the affiants believe the property sought to be attached is exempt from execution. The statute requires such a sworn statement presumably because of the potential harm that would be caused by ordering attachment to a citizen's exempt property. Failure to include the required sworn statement means that the affidavits do not comply with § 31.020 and attachment cannot issue.

1           Second, the affidavits put forward by Plaintiffs openly rest on hearsay  
2 instead of personal knowledge. For example, Plaintiffs claim that attaching a copy  
3 of the Sentencing Memorandum filed by the prosecution in a separate legal  
4 proceeding sets “forth facts indicating that Defendant was planning to send the  
5 subject funds to his husband in Germany.” (ECF No. 5 at 15). Surely this statement  
6 is not converted into reliable personal knowledge simply because it is sworn under  
7 oath by an attorney. Similarly, the affidavits attempt to attach emails sent to  
8 unnamed third parties who are also supposedly clients of the affiants to support  
9 issuance of a writ. The affiants do not claim to have personal knowledge as to the  
10 content of any images that were seized from Fuechtener. The affiants have never  
11 seen any material that the United States seized from Fuechtener. The affiants rely  
12 solely upon the victim notification emails to establish a connection to Fuechtener’s  
13 conduct.

14           This is not personal knowledge of course. This is not even second-hand  
15 knowledge. The emails and other attachments to the affidavits present hearsay-  
16 within hearsay-within hearsay that is too tangled to even analyze. Plaintiffs have  
17 provided only conclusory affidavits, not based on personal knowledge, “which  
18 affords no basis for a court,” to determine the veracity of their claims. *Paramount*  
19 *Ins., Inc. v. Rayson & Smitley*, 472 P.2d at 530, 534 (1970). The Nevada Supreme  
20 Court has previously held that similar conclusory and unqualified affidavits were  
21 insufficient to support a writ of attachment. *Id.* The same is true in this case.

22           Third, the affidavits in this case do not show in “reasonable and clear detail”  
23

1 facts showing the existence of one of the grounds for attachment. Nev. Rev. Stat.  
2 Ann. § 31.020(c). Plaintiffs do not already possess a judgment against Fuchtener,  
3 and they are required to swear to facts supporting the legal grounds for their  
4 requested writ. Plaintiffs have sought a prejudgment writ under § 31.013 so they  
5 must show their claims meet the limited class of cases where attachment is  
6 permitted. Plaintiffs have not provided any facts based on personal knowledge  
7 which demonstrate “extraordinary circumstances exist,” as required for attachment  
8 to issue. Nev. Rev. Stat. Ann. § 31.013. Plaintiffs affidavits do not even provide  
9 allegations that the particular funds held in the registry are Fuechtener’s only  
10 property which could satisfy an adverse judgment. Although Fuechtener has been  
11 convicted he has already satisfied all of his criminal monetary penalties.

12 Extraordinary circumstances do not exist in every lawsuit brought under 18  
13 U.S.C. § 2255(a). The affidavits provided by Plaintiffs do not even provide  
14 allegations that one of the § 31.013 grounds for attachment exists. Allowing a pre-  
15 judgment writ of attachment to issue simply “upon verification by oath of the  
16 plaintiff...that there is probable cause to sustain the validity of the plaintiff’s  
17 claims,” without more violates the due process clause of the Fourteenth  
18 Amendment. *Connecticut v. Doeher*, 501 U.S. 1, 5 (1991). That is why strict  
19 compliance with Nevada’s statutory requirements is an indispensable prerequisite  
20 to issuing a pre-judgment writ of attachment. Plaintiffs have failed to satisfy  
21 multiple parts of the statutory requirements. Plaintiffs’ motion should be denied.

22 **II. Funds in court registry belong to Magic Trust and are exempt from**  
23 **execution or attachment as undistributed interests in trust property.**



1 There has never been a dispute that the funds deposited into the registry in  
2 Fuechtener's criminal case originated from the sale of real estate owned by the  
3 Magic Trust. (Crim. ECF No. 207 at 2). The Magic Trust has never distributed these  
4 funds to its beneficiaries Fuechtener. (*Id.*). The funds still held with the Clerk of  
5 Court were, and remain, the property of the Magic Trust. A previously filed copy of  
6 the original Magic Trust document is attached here as **Exhibit B** and incorporated  
7 by reference. (*See also* Crim ECF 188-1).

8 **A. Magic Trust creates undistributed discretionary interest**

9 In Nevada, a trust generally is irrevocable "except to the extent that a right  
10 to amend or revoke the trust is expressly reserved by the settlor." Nev. Rev. Stat.  
11 Ann. §163.004(2). A revocable trust provides its beneficiaries with "only a  
12 contingent interest, at most, while the settlor is still alive." *Linthicum v. Rudi*, 148  
13 P.3d 746, 749 (Nev. 2006). The Magic Trust is a revocable trust. (Exh. B at ¶¶ 1.2,  
14 9.1); (*see* Crim. ECF No. 207 at 2).

15 Nevada law defines the rights of beneficiaries in connection with  
16 discretionary trusts: "[a] beneficiary who has a discretionary interest in a trust does  
17 not have an enforceable right to a distribution from the trust." Nev. Rev. Stat. Ann.  
18 § 163.419(1). Additionally, if a trust instrument requires the trustee to distribute  
19 trust income and principal to the beneficiaries for their support but qualifies that  
20 support requirement by granting the trustee full discretion to make support  
21 distributions, then the trust beneficiaries only possess a discretionary interest in  
22 the trust distributions. *See* Nev. Rev. Stat. Ann. §§ 163.4155, 163.4185(1)(b) & (3).

1 Section 5.1 of the Magic Trust instrument provides exactly this type of authority:

2 **Distribution of Assets During the Lifetime of the Primary**  
 3 **Beneficiaries.** Until the deaths of the Primary Beneficiaries, the net  
 4 income and principal from the Trust shall be distributed to the Primary  
 5 Beneficiaries as is necessary, in the sole discretion of the Trustee or  
 6 Trustees, for the support, happiness and health needs of the Primary  
 7 Beneficiaries.

8 (Exhibit B, at ¶5.1). The express terms of the Magic Trust make it clear that the  
 9 trustees retain “sole discretion” to make any support distributions. (*Id.*). As a result,  
 10 under Chapter 163 the Magic Trust only grants a discretionary undistributed  
 11 interest in the Magic Trust’s assets to its beneficiaries, including Fuechtener. Thus,  
 12 Fuechtener has no “enforceable right to a distribution from the trust.” *See* Nev. Rev.  
 13 Stat. Ann. § 163.419(1).

14 **B. Fuechtener’s interest in Magic Trust is exempt from execution**

15 Nevada law makes a wide category of property exempt from execution by  
 16 statute. *See* Nev. Rev. Stat. Ann. § 21.090. Certain interests in trust assets are  
 17 among the types of property made exempt by the Nevada legislature. *Id.* at  
 18 §21.090(cc), (dd); *see* D. Grant & J. Cooper, *Nevada Laws Provide Top Trust Situs*,  
 19 Nev. Law. Mag., May 2010, (available at [https://www.nvbar.org/nvlawmag-archive-](https://www.nvbar.org/nvlawmag-archive-957232/May_2010_Trust_Situs.pdf)  
 20 957232/May\_2010\_Trust\_Situs.pdf). The Magic Trust has a spendthrift provision  
 21 which in turns triggers more generous property exemption protections. (*See*  
 22 **Exhibit B** at ¶12.5) (“Spendthrift Provision”). As a result, both “mandatory” and  
 23 “discretionary” distribution interests held by Magic Trust beneficiaries are exempt  
 from execution until the time of actual disbursement. Nev. Rev. Stat. Ann.  
 §21.090(cc)(2), (dd) (1). Even if Magic Trust beneficiaries had a right to enforce their

1 support interest (which they do not as described above), the undistributed support  
2 interest would still be exempt. Nev. Rev. Stat. Ann. §21.090(dd)(2).

3 The protections afforded trust property under Nevada law do not end with  
4 the § 21.090 exemptions. Nevada law also specifically prohibits any “creditor” action  
5 or court order requiring at trustee to:

- 6 (1) Distribute any discretionary interest;  
7 (2) Distribute any mandatory interest which is past due directly to a  
8 creditor; or  
9 (3) Take any other authorized action in a specific way

10 Nev. Rev. Stat. Ann. § 163.417(1)(c). A trustee cannot be required to distribute a  
11 “beneficial interest” solely because the named “beneficiary is a trustee.” *Id.* at (1)(d).  
12 Additionally, the same statute expressly provides that “[t]rust property is not  
13 subject to the personal obligations of the trustee, even if the trustee is insolvent or  
14 bankrupt.” § 163.417(2).

15 The funds which belong to the Magic Trust and are held in the registry were  
16 never distributed by the Magic Trust to any beneficiaries. Instead, the funds were  
17 ordered deposited directly at or near the time of closing from the Donald Nelson  
18 property sale. (*See* Crim. ECF No. 207 at 2) (“no dispute” the funds came from  
19 Magic Trust property). The Magic Trust, through its co-Trustee Frank Alford,  
20 intervened as an interested party in the underlying criminal case to assert its right  
21 to the funds. (*See* Crim. ECF No. 188, 197, 214). Holding the Magic Trust property  
22 in the court registry has not caused a transmutation of the essential character of  
23 those funds: they still belong to the Magic Trust.

Plaintiffs have sued Fuechtener, not the Magic Trust. Trust property is not

1 subject to the personal obligations of Fuechtener as a trustee even if he is  
2 personally insolvent. Nev. Rev. Stat. Ann. § 163.417(2). Neither Plaintiffs nor a  
3 court can force Fuechtener as a trustee of the Magic Trust to “take any...authorized  
4 action in a specific way,” regarding the funds being held. Nev. Rev. Stat. Ann.  
5 §163.417(1)(c). So, it is indisputable that Plaintiffs cannot reach the Magic Trust  
6 funds through Fuechtener in his role as a co-trustee.

7 Plaintiffs can do no better based on Fuecthener’s status as a Magic Trust  
8 beneficiary. Any interest Fuechtener has in the funds still held which belong to the  
9 Magic Trust is undistributed. Fuechtener has no “enforceable right to a  
10 distribution,” from the Magic Trust since the trust includes only a discretionary  
11 support interest. Nev. Rev. Stat. Ann. § 163.419(1); *see* § 163.4185(3) (classifying  
12 interests). As a result, Plaintiffs cannot force the Magic Trust to distribute the trust  
13 property being held directly to them through Fuechtener in his role as a beneficiary  
14 either.

15 Last, Fuechtener’s interest in the Magic Trust funds being held is property  
16 which is exempt from execution under Nevada law. To reiterate, Fuechtener’s  
17 interest in the Magic Trust property is classified as a discretionary interest.  
18 Fuechtener’s discretionary interest in the corpus of the Magic Trust which consists  
19 in part of funds being held by the Clerk of Court is unequivocally “undistributed.”  
20 Discretionary interests in Magic Trust property which are undistributed are  
21 categorically exempt from execution. Nev. Rev. Stat. Ann. § 21.090(1)(cc)(2).  
22 Further, since the Magic Trust contains a spendthrift provision, even Fuechtener’s  
23

1 beneficial interest in the trust were classified as mandatory it is still undistributed  
2 and thus exempt. Nev. Rev. Stat. Ann. § 21.090(1)(dd)(1) & (2). Since Fuechtener's  
3 interest in the undistributed portion of the Magic Trust property is exempt from  
4 execution it would be unlawful to grant Plaintiffs' requested writ of attachment.  
5 The Court should deny Plaintiffs' motion.

6 **III. Alternatively, the Court should hold an evidentiary hearing after**  
7 **proper notice to determine if a writ of attachment should issue.**

8 Fuechtener believes that Plaintiffs' motion should be denied outright as  
9 discussed at length above. However, if the Court disagrees with Fuechtener that  
10 denial is proper at this stage then the Court should order an evidentiary hearing  
11 prior to granting Plaintiffs' motion. *See* Nev. Rev. Stat. Ann. § 31.013 (permitting  
12 attachment in limited class of cases "after notice and hearing."). Ordering an  
13 evidentiary hearing in this case where Plaintiffs have not complied with Nevada  
14 law's substantive or procedural requirements would help assure that attachment  
15 does not improperly issue and deprive Fuechtener, or the Magic Trust, of due  
16 process of law. *See Tri-State Dev., Ltd. v. Johnston*, 160 F.3d 528 (9th Cir. 1998).

17 **Conclusion**

18 The Court should deny Plaintiffs' motion for pre-judgment writ of attachment  
19 since it is improper for the reasons stated above. Alternatively, the Court should  
20 hold an evidentiary hearing on Plaintiffs' request prior to issuing any writ of  
21 attachment.

22 Respectfully submitted,

23 /s/ Lance J. Hendron

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Counsel *Pro Hac Vice*<sup>2</sup> for Jan Fuechtener

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served this  
1st day of November 2019, via CM/ECF on all counsel of record.

/s/ Lance J. Hendron  
Lance J. Hendron

<sup>2</sup> Counsel's *pro hac vice* petition is still pending at this time. (See ECF No. 30).